IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

GISSEL PACKING CO., INC.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Brief For Gissel Packing Co., Inc.

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STATEMENT OF THE CASE

On January 22, 1965, petitioner union notified Gissel Packing Company that the union represented a majority of "eligible employees". The letter did not request bargaining, but indicated that it confirmed a prior telephone conversation of that same day in which recognition and bargaining were requested. (G. C. Exh. 2, R13, 232). The company promptly re-

plied to this letter stating its refusal to recognize the union because the company felt a majority of employees were not represented. This letter mentioned an earlier election conducted by the National Labor Relations Board in which the union also contended that it represented a majority, but subsequently lost the election. The letter also mentioned that the union had made no current attempt to secure an election under fair and honest circumstances. (G. C. Exh. 3, R14, 233-234). On February 11, 1965, an unfair labor practice charge alleging refusal to bargain was filed by the union, beginning proceedings leading to the present cause.

Within the same general span of time, this same union was also involved in organization campaigns with other employers, leading to actions by the National Labor Relations Board so close in activity, charge, testimony and finding as to strongly suggest more than chance. The attempt at organization of Gissel Packing Company was but one minor phase of an extensive campaign aimed at several victualers in the general area. It would be beyond the scope of imagination that the employees of these scattered firms all and at the same time approached the union. As illustrations, see the following cases, involving this same union in the same span of time: *NLRB v. S. S. Logan Packing Company,* 4th Cir., 1967, 386 F.2d 562; *NLRB v. Sehon Stevenson & Co.,* 4th Cir., 1967, 386 F.2d 551; and the *Davis Wholesale Co.* cases, 165 NLRB No. 39, 165 NLRB No. 40, 166 NLRB No. 119, now pending before the United States Court of Appeals for the District of Columbia

Circuit as Cases Nos. 21,155, 21,244, 21,787, 21,788 and 21, 789.

SUMMARY OF ARGUMENT

The actions of the National Labor Relations Board in accepting authorization cards as presumptive or conclusive proof of a labor organization's majority status, and the concomitant duty of an employer to bargain based thereon, are contrary to the intent, purpose and language of the Taft-Hartley amendments to the National Labor Relations Act.

Although the Board has generally recognized as theory that a good faith doubt on the part of an employer is an adequate defense to a refusal to bargain charge, in practice it has improperly based refusal to bargain findings on unconnected findings that violations of sections 8(a)(1) and (3) of the Act negated the employer's good faith doubt.

This general scheme of activity has resulted in the mentioned treatment of such cards as presumptive, despite the widely known and accepted unreliability of authorization cards in the determination of an employee's actual desire.

In so doing, the employee has been caused by the Board to become a forgotten man and the concept of labor-management relations has been characterized for all realistic purposes by the Board as a field of battle where the only interested parties are the unions and employers.

The instant case is a clear example of the Board's activities and bent. There is an open and obvious predilection by the Board to foster recognition of unions without regard to the rights of employees to express their wishes. The Trial Examiner's findings on which the order is based reflect that the burden of proof was not sustained by the Board's counsel, that the burden was in fact shifted to the employer, and that the entire hearing process was so lacking in impartiality as to render valueless the minimum requirements demanded by the Administrative Procedures Act.

The union here involved was engaged in organizational activities in several businesses in the area, and had attempted to organize in years past. The union's predilection for overstatement was known to respondent in fact as well as reputation, since the same union had previously claimed majorities in similar businesses and to this same respondent, but subsequent elections belied the claim of majority.

This affirmative basis for the employer's doubt was given scant consideration in favor of conjecture and speculation by the trier without reasonable basis on the record taken as a whole.

The action of the United States Court of Appeals for the Fourth Circuit on the issues here involved was proper and should be affirmed.

ARGUMENT

I.

An Employer is not Obligated to Bargain with the Union Solely on the Basis of Authorization Cards Allegedly Signed by a Majority of Employees

It should be noted at the outset that the National Labor Relations Board and the petitioning union rely in large part upon a prior decision of this Court, *United Mine Workers of America v. Arkansas Oak Flooring Company,* 351 U. S. 62, 76 S. Ct. 559, 100 L.Ed. 941 (1956). In that case, however, this Court stated, at Footnote 2, 351 U. S. 68:

> . . . Accordingly, we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees, *or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees.* [Emphasis added].

It appears clear that in the approximately 34 years since passage of the Wagner Act, there has been a growing tendency on the part of the National Labor Relations Board to foster recognition of unions. In recent years, the Board has diverged from its previous position of generally holding elections when requested, to the present situation wherein the use of authoriaztion cards has come, by and large, to substitute for the elective process unless two unions are competing for recognition.

In 1935, an employer was first required "to bargain collectively with the representatives of his employees." National Labor Relations Act, Section 8(a)(5), 49 Stat. 452 (1935). There was a requirement that the representative be designated or selected for the purposes of collective bargaining by a majority of the employees, but there was no specific manner in which determination was to be made as to whether or not a majority of employees wanted such representation. The Wagner Act allowed the NLRB to "take a secret ballot of employees, or utilize any other suitable method" to ascertain such representatives. National Labor Relations Act, Section 9(c), 49 Stat. 453 (1935).

In 1947, the Taft-Hartley Act revisions to the NLRA were passed. The Taft-Hartley Act, as passed, did not amend Section 8(a)(5) and Section 9(a) was largely unchanged. Section 9(c), however, was completely revised to allow, for the first time, a petition by an employer when only one union was requesting representation, and to provide if "a question of representation exists, it [the Board] shall direct an election by secret ballot and shall certify the results thereof." Thus, the Wagner Act language allowing other forms of determination was stricken. This change is discussed in *NLRB v. S. S. Logan Packing Company,* 4th Cir., 1967, 386 F. 2d 562. See also Comment, *Union Authorization Cards,* 75 YALE L. J. 805, 820 (1966).

The proponents for the determinative use of authorization cards, as stated at great length in

Petitioners' briefs in this matter, attempt to rely on the fact that there was no change in Sections 8(a)(5) or 9(a), under Taft-Hartley.

It should be recognized, however, that the original House version (Hartley) of the bill, as reported by the House Committee on Education and Labor, would have amended Section 8(a)(5) to read that it would be an unfair labor practice for an employer "... to refuse to bargain collectively with the representative of his employees currently recognized by the employer or certified as such under Section 9." H. R. 3020, 80th Cong., 1st Sess. 21 (1947). After passage of the Senate version, the usual conference committee was appointed to reconcile differences. In that conference, the Section 8(a)(5) House amendment was dropped, with the later erroneous indication in the conference report that neither the House bill nor the Senate amendment had changed any provisions of Section 8(a)(5). H. R. Conf. Rep. No. 510, 80th Congress, 1st Sess. 41 (1947).

This erroneous presentation has been taken by at least one commentator to indicate that the conference committee felt there was no necessity for a change in 8(a)(5) in view of the later changes to Section 9(c). Comment, *Union Authorization Cards,* 75 YALE L. J. 805, 820 note 103 (1966). Further, the statements made on the floor of the Senate, in the version passed over presidential veto, clearly indicatd that an employer had a *right* to election. As stated by Senator Taft, reported 93 Cong. Rec. 3954 (daily ed., April 23, 1947):

> Today an employer is faced with this situation. A man comes in to his office and says, "I represent your employees. Sign this agreement, or we strike tomorrow." . . . The Bill gives him a right to go to the Board under those circumstances, and say, "I want an election. I want to know who is the bargaining agent for my employees." Certainly I do not think anyone could question the fairness of such a proposal.

Senator Ball further indicated that the amendment would give the employer "the right to make sure, by a democratic election, that a union really represents his employees before he negotiates a contract with it." 93 Cong. Rec. A2377 (daily ed., May 13, 1947).

The NLRB, in its 1948 report, recognized that a limitation had been placed upon it, noting:

> "Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed — but rarely exercised — to utilize other 'suitable means' of ascertaining representatives." 13 NLRB Ann. Rep. 32 (1948).

As a reading of Section 9(c) will clearly establish, there is no discretion allowed the Board as to the method of ascertaining a majority or as to requiring such determination if any question of representation exists. The subsection is phrased with the mandatory "shall" rather than the permissive "may".

The Board has chosen to avoid the mandatory

provisions of Section 9(c), by making a subjective determination as to good faith on the part of the employer and, if the employer fails to pass this subjective determination, the Board finds that no actual question of representation arises and an election is therefore not to be held. Cf. *Aiello Dairy Farms,* 110 NLRB 1365, 1368 (1954).

In more recent years, the pattern set forth in this particular case has become more apparent. A union presents authorization cards, the employer declines to bargain, and charges of 8(a)(1), (3) and (5) violations are then filed. A blatant example of the Board's reasoning is shown in the *Wasau Steel Corp.,* 160 NLRB 635 (1966), *enforced,* 377 F.2d 369 (7th Cir., 1967), where the Board ignored the entire process and stated that where a company had foreclosed by any illegal conduct the customary means of resolving a majority, an election, proof of majority status might be made by cards. The Court went on to say that a bargaining order would be appropriate to restore the status, even assuming *arguendo* that the record would *not* warrant a finding of unlawful refusal to bargain under Section 8(a)(5) of the Act.

II.

Authorization Cards Are An Unreliable Indicator of An Employee's Actual Preference as to Representation by A Labor Organization

It is one of the oddities of these times that, in the present posture of labor-management relations,

the general assumption by labor advocates is that the interests of labor and management are necessarily in opposition, with a battle line drawn between "organized labor" on the one hand and management on the other.

This view, apparently followed by the NLRB, is in direct contravention of the intent of labor legislation. The rights given are not phrased to apply to "organized labor", or labor unions. Instead, the rights to be considered are those of the individual employee. As stated in Section 7 of the NLRA:

> *Employees* shall have the right to self-organization, to form, join or assist labor organizations . . . [Emphasis added].

In practice, the individual employee has become the forgotten man. The actions and decisions of the NLRB in large part involve the employee only as a prize with rules regulating the manner of his capture by unions.

The situation present in this cause strongly reflects this treatment. The NLRB has an elective process with which to determine the actual and uncoerced desire of an employee under safeguards far stronger and more protective than are those under which this nation does now, and has from inception, chosen those who are responsible for the actions and continuing existence of the nation.

The Board chooses not to believe its own statements as to elections. It says, at page 65 of the Com-

merce Clearing House reproduction, *Thirty-Second Annual Report of the National Labor Relations Board* (1968):

> Board elections are conducted in accordance with strict standards designed to assure that the participating employees have an opportunity to determine, and to register a free and untrammeled choice in the selection of, a bargaining representative.

It is apparent that the use of authorization cards to effect recognition has become more popular with unions unwilling to risk a fair and honest selection through a supervised election. In recent years, cognizance of the abuses attendant with the securing of such cards on an individual basis has become recognized by some authorities, and by some courts which decline to act as rubber-stamp enforcers of Board decisions.

The reason for union reliance on any method of gaining recognition other than through fair choice is apparent when it is found that in fiscal year 1967, the latest for which figures are available, 7,882 elections were conducted by the Board, and four out of ten were lost by unions. Of the 7,882, 4,722, or 60%, were won by unions, *including* elections where the essential choice was between rival unions. Chart 12, *Thirty-second Annual Report of the National Labor Relations Board* (1968).

Doubt as to the validity of authorization cards has long been present. For instance, then Board

Chairman McCulloch pointed out in a speech to the American Bar Association that in 57 elections where unions presented authorization cards from over 70% of the employees, they won 43, or 75% of them; thus, unions *lost* one in four elections where employees were given a free choice, even though their card-based apparent approval would indicate that a lost election would be a statistical rarity. 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17.

The Fourth Circuit is not the sole circuit to recognize the deficiencies inherent in authorization cards. The Sixth Circuit, in *N.L.R.B. v. Fashion Fair, Inc.*, 6th Cir., 1968, 399 F.2d 764, quoting with approval the Second Circuit, said

> As both the Courts and the Board recognize, the use of authorization cards is a "notoriously unreliable method of determining the majority status of a union." *N.L.R.B. v. Flomatic Corporation*, 347 F. 2d 74 (C. A. 2). (Other citations omitted). . . . to base a recognition and bargaining order on such questionable procedures in "strong medicine to be used only 'with restraint' ". *Lane Drug Co. v. N.L.R.B.* 391 F.2d 812 (C. A. 6).

The Board, in its brief, attempts to remove the plaguing quotation from *Flomatic Corporation* from consideration by indicating that the comment applies only where two or more unions are competing for the employee. This reasoning would appear to be ill-founded, for under such circumstances, there are at

least competing organizations to check one another's activities. In the single union case, the reliability would be substantially less, for usually — as in the present case — authorization cards are sought quietly and the first indication to management of such activity is the demand for bargaining.

There is, of course, a difference in the standards applying to use of cards and the circumstances surrounding elections. The Fourth Circuit has recognized this in its landmark *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F.2d at p. 564 et seq:

> It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check," unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. [footnotes omitted]
>
> * * *
>
> The unsupervised solicitation of authorization cards by union is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feeling of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees

and of potentially powerful union organizers may weigh heavily in the balance.

* * * *

Without adequate supervision, solicitors of authorization cards may resort to a wide variety of other threats. Discrimination in the exaction of initiation fees is frequently encountered, and, particularly where untrained fellow-employees are used as solicitors, use of threats of discrimination against non-signers in the compilation of seniority rosters and other conditions of employment may be a strong temptation.

The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

> For such reasons, a card check is not a reliable indication of the employees' wishes. [footnotes omitted]

The unreliability of authorization cards has been recognied by the AFL-CIO in the oft-quoted remark from the *AFL-CIO Guidebook for Union Organizers* (1961) that:

> NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to "get the union off my back." Cf. Petitioning union's brief at p. 39.

Counsel for the petitioner union has included as a part of its supplemental appendix, p. 41, Senate Bill 426 as introduced by Senator Fannin in the current 91st Congress. Senator Fannin's comments on two occasions indicate his thought that Section 9(c) of the Act is being ignored by the Board in its attempts to justify authorization card recognition. In 1965, Senator Fannin introduced S. 2226, with the following remarks at 111 Cong. Rec. 15124 (1965):

> "Reliance on card checks instead of secret ballot elections by the National Labor Relations Board is increasing. If it is not slowed down, Section 9—election machinery—and 8(c)—free speech—may as well be repealed . . . The Board's recent thinking seems to be that authorization cards are a true and valid indication of employee desires. This is not so."

In introducing the current S. 426, Senator Fan-

nin makes it clear that he is not acting from sympathy for employers, but to safeguard the laborer in 115 Cong. Rec. 591 (daily ed., January 21, 1969):

> "These bills are the same as those introduced by me in the 90th Congress . . . A second bill would amend the National Labor Relations Act so as to require a Board-Conducted election in all representation cases. Thus the bill would prevent voluntary recognition of a union by an employer, a practice which has led to many abuses. I have always believed that it is the right of the worker, and not his boss or a few union advocates, to cast his ballot secretly for or against union representation."

III

The Board Failed to Sustain its Burden of Proof that Respondent Had No Good Faith Doubt as to the Union's Majority Status

The Board has the burden of proof in any proceeding and, as set forth in Section 10(c) of the Act, ". . . If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, . . .," the Board may issue an order or take affirmaive action.

In actual practice, the Board assumes a good faith doubt is not present when bargaining based on authorization cards is requested. The Board's position is that a violation of Sections 8(a) (1) or (3)

of the act also negates good faith under Section 8(a) (5).

Determination of the charges originally filed in this cause rested initially with a trial examiner, whose findings were adopted by the Board. Respondent believes that discussion of the findings of violations of Sections 8(a) (1) and 8(a) (3) is relevant here since the finding as to the 8(a) (5) violation is based principally on the other findings.

(a) Alleged Section 8(a)(1) Violations

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7". Section 7 pertains to the rights of employees to engage in or refuse to engage in labor union activities.

The trial examiner found that some eleven acts violated Section 8(a)(1) of the Act. (R pp. 284-286). Of these, nine of the specific incidents are alleged statements made by Charles Gissel. Of the remaining two, one is a statement made by Herbert Gissel and the other is the presence of Terry Lewis, a member of the Gissel family, at a hotel where the labor union had called a meeting.

In general, respondent believes it would serve no useful purpose to discuss in detail the testimony relating to the statements allegedly made by Charles Gissel and Herbert Gissel. In the usual Board man-

ner, it is charged that certain isolated statements were made over a period of several months time, without identifying them in the original complaint. In the present case each of the alleged statements were effectually denied by the Gissels. The trial examiner nevertheless uniformly credited the testimony of board witnesses and discredited testimony of Company witnesses. This uniform crediting will be discussed, below, in more detail.

It should be noted, however, that this Company had been involved in labor proceedings with the same Union some years prior to the present campaign, and had been specifically aware of the minimal statements required for the Board to allege 8(a)(1) violations. It would be contrary to reason that Company officials who worked side by side with employees would make the alleged statements with this knowledge.

There is, however, one incident which should be discussed. This is that designated as No. 9(R 286), relating to the presence of Terry Lewis at the hotel on April 17. Terry Lewis is the nephew of Alfreda Closterman, a company official. His mother is a member of the Gissel family. It is not denied that he was present at a hotel where a union meeting was to be held. He was a part-time employee of Gissel Packing Co., but primarily a high school student, and had seen a notice addressed to all employees. He went into a telephone booth, called his girl friend, and his aunt. The trial examiner, in an obvious attempt to justify her conclusions, relied heavily upon the mere presence of Terry Lewis at the meeting

in finding ultimate violations. (R 294) Her statement is, "the admitted presence of Lewis at the hotel is one of the most significant facts in the record both generally and in connection with the discharge of Mount and Frye." The trial examiner completely ignores the fact that, rather than having been instructed to attend the meeting, Terry Lewis was instructed to leave it promptly upon his aunt learning of his presence there. He did not go inside the meeting. He did not hear anything that transpired or happened at the meeting. He did not undertake to give a report to anybody in the management of Gissel Packing Co. as to what happened at the meeting. (R 185-186). He was, of course, well known to the employees. In fact, Herbert Mount, Jr., one of the employees involved in the 8(a)(3) violation charged, saw him and eavesdropped on the conversation. In Mr. Mount's words, after having heard Lewis pronounce Mrs. Closterman's name on the phone, he said, "Well, then, we shoved the telephone booth door open and he jumped out and ran." (R 65). The trial examiner, while expressing some doubt as to Mount's reliability, generally credited his testimony when in conflict with that of company personnel. This, despite the strong inference of violence created by his actions toward Lewis.

The trial examiner inferred from the mere presence of Lewis at the hotel that all matters relating to this were suspect insofar as company actions were concerned. She completely ignored the fact that he was directed to leave, that he was known to the employees, and that he did so leave without making re-

ports to anyone as to the presence of persons there. In fact, there would be no way for him to know all of the employees present since he left prior to the beginning of the meeting.

Finally, the trial examiner overlooked one factor so important as to be well-nigh conclusive: Terry Lewis, as a part-time employee, not supervisor or official, *was within the bargaining unit and would have been entitled to vote if an election were held.* (See R 305, twelfth name). He had a right to be present at the meeting, and was within the definition of "all employees" in the posted notice of the meeting. (R 183).

(b) Alleged Section 8(a) (3) Violations

The Board has also charged that the Herbert Mount, Jr., and Jerry Lee Frye were discriminatorily discharged. Charles Gissel maintained that they had left the job and did not work on a Wednesday afternoon, but were, in fact, working somewhere else.

The Board charged that the reason for the discharges was because of alleged union activities on the parts of the persons. The trial examiner, in a very tortuous reasoning process, finds in several alternatives that the actual discharge reason was for union activities. Counsel for respondent suggests that a thorough study of the reasons given by the trial examiner beginning at Page 295 of the Record will clearly show that there was no discrimination involved. Mount had been previously discharged but

was recalled because Charles Gissel was fearful that an unfair labor practice charge would be filed. This, of course, controverts the alleged discrimination. The facts involved are clear. The men were expected to work Wednesday afternoon, did not, and it was determined they had quit by Gissel because they were working somewhere else. The trial examiner relied on no substantial facts for credit. Instead, her reasoning process was based upon evidence which, she said, *should* have been produced to satisfy her that Charles Gissel was telling the truth. Respondent submits that this is a blatant reverse of the law which should apply, that is, that the board has the burden of proof. In this instance, as well as in several others in this matter, the trial examiner has shifted the burden of proof entirely to the employer.

(c) The Board, through its Trial Examiner, Attempted to Substantiate A Preconceived Conclusion

Respondent submits that it is clear from the record and from the findings in this matter that the National Labor Relations Board, through its various representatives, had determined that the ultimate result would be a bargaining order and, to support its findings, 8(a)(1) violations were constructed from a gossamer weave of facts.

It should be noted that all discretion vested in the trial examiner as to rulings, the admission of evidence, and inferences to be drawn was exercised in favor of the union. In fact, the reasoning processes

of the trial examiner in upholding the various charges amounted in many instances to inference built on inference built on inference. To cite but a few examples, in addition to those previously mentioned, in her footnote 42, (R 292), the trial examiner indicates that respondent had refused to contend that men were discharged for cause, when this was contrary to fact, and she apparently was dissatisfied because the employer refused to falsify matters which had occurred; in her footnote 29 (R 276), the trial examiner speculates without factual support to further bolster her findings; in her footnote 20 (R 269), the trial examiner credits testimony of one Maynard despite conflicts in his pre-hearing affidavit, and, without facts to substantiate her, excuses Maynard's clear testimony concerning a date upon which an alleged statement was made; in her footnote 12 (R 263), the trial examiner attempts to draw a distinction between a printed signature and a written signature, where an authorization card had been signed with an X; and, in her footnote 8 (R 260-261), the trial examiner states "I am convinced that Pure Oil sent a report and that it was not introduced into evidence because it did not substantiate the Company's claim." There is no fact to support her conviction, and this is a prime example of the tortuous and inferential reasoning to which the trial examiner goes to support her preconceived conclusions.

Respondent submits that the findings of 8(a)(1) and 8(a)(3) violations made by the trial examiner show clearly and convincingly that this result was

pre-ordained despite what the evidence might have been. The trial examiner was not privileged to ignore testimony, or to rely upon evidence taken out of context. Indeed, as shown above, in many instances she relied upon alleged facts and convictions which were non-existent.

Respondent further believes that the hearing and conclusions made as a result thereof by the trial examiner were so biased and prejudiced as to render impartiality wholly absent, despite the statutory duty of the trial examiner. Particularly as to the 8(a)(1) and 8(a)(3) violations, respondent submits that the trial examiner's partiality is so clear that a mockery of judicial process has been made.

The Board's finding is contrary to the statement of the Board, itself, at page 98, Commerce Clearing House reproduction of the *Thirty-second Annual Report, supra:*

> The Board has long held that an employer may refuse to recognize and bargain with a union upon its demand for initial recognition and may insist upon proof of the union's majority status through election procedures unless the refusal is not based upon a good-faith doubt of the union's majority. It is equally clear that in a case involving such a refusal, the General Counsel has the burden of proving the employer's lack of good faith. The cases decided by the Board during the report year include a number requiring determination of whether the requisite lack of good faith doubt had been established. In one such case, the Board explained that:

> . . . the . . . burden-of-proof rule is designed to assure, in implementation of Board policy, that an employer who in good faith withholds recognition because of a doubt of majority, though his doubt is founded on no more than a distrust of cards, may have an election to resolve that doubt, and will not be subject to an 8(a)(5) violation simply because he is unable to substantiate a reasonable basis for his doubt. But . . . the rule . . . is only an evidentiary one which is to be read as dovetailing with, rather than altering, the long-settled substantive principle that an employer may not in the absence of a good-faith doubt refuse to recognize a majority union. (Citations omitted).

The Courts have almost uniformly questioned the validity of the Board's reliance on Section 8(a)(1) and (3) violations to substantiate violations of Section 8(a)(5). See, *e.g., N.L.R.B. v. Hannaford Bros. Co.,* 1st Cir., 1958, 261 F. 2d 638, 641; *Textile Workers Union v. N.L.R.B.,* 2d Cir., 1967, 386 F. 2d 790; *N.L.R.B. v. Dan River Mills, Inc.,* 5th Cir., 1960, 274 F. 2d 381; *N.L.R.B. v. S. S. Logan Packing Co.,* 4th Cir., 1967, 386 F. 2d 567, 568; *Wareson Steel Corp. v. N.L.R.B.,* 7th Cir., 1967, 377 F. 2d 369, 372.

The situation here involved is almost identical with that in *S. S. Logan Packing Co., supra.* The Fourth Circuit there said:

> An employer could not help but doubt the results of a card check as an indication of

> the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards and their signatures. If he had no honest doubt of the union's claim of support by a majority of the employees, it will be because of other evidence known to him, not because of the card check . . .
>
> Here, of course, there was some prior history to add to the employer's doubt of the union's claim. Four years earlier, the union had claimed to represent a majority of the employees, but, thereupon, lost a consent election, the validity of which is unchallenged. The proffer of a card check gave the employer no reason to attribute greater credence to the claim of majority representation than to the similar claim which the employees refuted in the secret consent election four years earlier.

This quotation could be used intact in the instant case.

Here, too, the same union was involved.

Here, too, the union had previously claimed a majority.

Here, too, the union's claim to majority was proven false in the subsequent election.

The trial examiner in this case, unlike the Court in *Logan,* failed to give this direct, affirmative and factual evidence any weight in her subjective determination of the employer's good faith in its doubt.

The entire subject of substitution of administrative decisison for judicial process has long been scrutinized and frequently criticized. Recently, an order of the Interstate Commerce Commission was set aside by this Court in *The Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, ...U.S....., ...S. Ct....., 21 L.Ed.2d 219 (1968). There, this Court stated that to affirm the Commission's finding would be to say that the expertise of the Commission was so great that its mere statement would put an end to a particular controversy. This Court then said, 21 L.Ed.2d at 224:

> The requirement for administrative decisions based on substantial evidence and reasoned findings — which alone make judicial review possible — would become lost in the haze of so-called expertise . . . That is impermissible under the Administrative Procedures Act.

Respondent submits that the evidence is less substantial and the findings reasoned with markedly less basis in the instant case than were those of the Commission. The standards applicable are, however, the same regardless of the title or scope of an administrative body.

(d) There Is No Basis For Failure To Hold An Election To Determine The True Desires of The Employees

There are clear indicators showing that the possibility of an election occured to the Board's representatives in this matter. In Appendix A to the Trial

Examiner's Decision, the following appears as footnote 1 (R 304):

> The persons assumed to be employees are those as to whom there is no evidence in the record. The assumption is for the purpose of determining the maximum number of employees in the unit and does not constitute a finding that they are in fact in the unit if they come within any of the classifications excluded by the Board in its Decision and *Direction of Election.* [Emphasis added].

Further, while the Petitioner's briefs herein discuss the propriety of disallowing elections where flagrant coercion has taken place, this remedy has no application in this case. The trial examiner made no finding of an hostile atmosphere, and there was no suggestion of fact or conclusion of law which even inferred that a fair election could not be held.

The employer's feeling is conveyed in G. C. Exh. 5, R 15, 237:

> * * * Under such circumstances, the National Labor Relations Board may conduct a fair and impartial election wherein the employees may determine for themselves whether or not your Union is entitled to represent them.

In view of the general refusal of the Board's 9th Region to direct elections on request of an employer under similar circumstances, which was well known and later verified, it was felt that a request

for election by the employer would be a useless act. See *N.L.R.B. v. S. S. Logan Packing Co., supra; N.L.R.B. v. Sehon Stevenson & Co., supra; Davis Wholesale Co., supra.* The union, as shown, was invited to have an election conducted.

If this course had been followed, then this entire pending matter could have been fairly and impartially resolved four years ago.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the United States Court of Appeals for the Fourth Circuit correctly applied applicable law as to the issues herein, and its action should be affirmed.

Respectfully submitted,

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